

**Table 1. ARAR Questions for February 4, 2010 Meeting with EPA.**

| Regulation                      | Citation   | Criterion/Standard   | Applicability/Appropriateness   | Requested Clarification   |
|---------------------------------|--|--|---|---|
| <b>Federal ARARs</b>            |  |  |   |   |
| Clean Water Act                 | 33 USC 1313, 1314<br>Most recent 304(a) list,<br>as updated up to<br>issuance of the ROD | Under Section 304(a), minimum<br>criteria are developed for water<br>quality programs established by<br>states. Two kinds of water quality<br>criteria are developed: one for<br>protection of human health, and<br>one for protection of aquatic life.                  | Chemical-specific and Action-<br>specific. Relevant and appropriate<br>for cleanup standards for surface<br>water and contaminated<br>groundwater discharging to surface<br>water if more stringent than<br>promulgated state criteria.<br>Relevant and Appropriate to short-<br>term impacts to surface water from<br>implementation of the remedial<br>action that result in a discharge to<br>navigable water, such as dredging<br>and capping if more stringent than<br>promulgated state criteria. | What is the basis for saying that<br>NRWQC are ARARs “if more<br>stringent than promulgated state<br>criteria”? Our understanding,<br>based on EPA guidance,* is that,<br>when a duly promulgated state<br>water quality criterion exists, it is<br>used <i>instead of</i> NRWQC.<br><br>*53 F.R. 51394, 51442 (Dec. 21,<br>1988) and EPA, <i>CERCLA<br/>Compliance with Other Laws<br/>Manual</i> § 3.2.3.2. |
| Clean Water<br>Act, Section 401 | 33 USC 1341 40 CFR<br>Section 121.2(a)(3), (4)<br>and (5)                                | Any federally authorized activity<br>which may result in any discharge<br>into navigable waters requires<br>reasonable assurance that the<br>action will comply with<br>applicable provisions of sections<br>1311, 1312, 1313, 1316, and 1317<br>of the Clean Water Act. | Action-specific. Relevant and<br>Appropriate to implementation of<br>the remedial action that results in a<br>discharge to the river if more<br>stringent than state implementation<br>regulations.   | What does “more stringent than<br>state implementation regulations<br>mean?” We understand Section<br>401 to require State certification.   |

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| Clean Water Act, Section 402 | 33 USC 1342  | Regulates discharges of pollutants from point sources to waters of the U.S., and requires compliance with the standards, limitations and regulations promulgated per Sections 301, 304, 306, 307, 308 of the CWA. | Relevant and Appropriate to remedial activities that result in a discharge of pollutants from point sources to the river if more stringent than state promulgated point source requirements. | The LWG ARARs Table states that CWA §402 is potentially relevant and appropriate for point source discharges “other than from dredged materials covered under CWA §404 and §401.” EPA’s Table does not include this qualification. Based on the other ARARs identified in the EPA Table, we believe that EPA agrees that CWA §404 and §401 are the applicable ARARs to dredging and discharge of fill material, and therefore CWA §402 would not be an ARAR. This is consistent with the Supreme Court’s decision in <i>Coeur Alaska, Inc. v. Southeast Alaska Conservation Council</i> , 557 U.S. (2009) (holding that discharge of fill material is regulated under CWA §404, not §402). We would like to discuss further so we understand EPA’s perspective on this issue. |
| Safe Drinking Water Act      | 42 USC 300f, 40 CFR Part 141, Subpart O, App. A. 40 CFR Part 143 | Establishes national drinking water standards to protect human health from contaminants in drinking water.  | Chemical-specific Relevant and appropriate as a performance standard for groundwater and surface water which are potential drinking water sources.   | What does EPA mean by “performance standard”? Is this the same or different than a cleanup standard?  |

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| RCRA – Solid Waste                                       | 40 CFR 257 Subpart A |  | RCRA Solid Waste requirements may be relevant and appropriate to remedial actions that result in upland or in-water disposal of dredged material. Requirements for the management of solid waste landfills may be relevant and appropriate to upland disposal. | RCRA Solid Waste requirements would not be relevant and appropriate for in-water disposal. The reference to “in-water disposal” should be stricken consistent with prior EPA determinations on the Terminal 4 Early Action. (See, e.g. Terminal 4 Action Memorandum (May 11, 2006), Response to Comment Golder-1 and Comment 75-1, which provides the following: sediments are not solid wastes under federal law; sediments that contain a listed hazardous waste or exhibit hazardous waste characteristics are exempt from the definition of hazardous waste if managed under the Clean Water Act (40 CFR 261.4(g)); and Clean Water Act §404 and 401 are the controlling ARARs for in-water disposal, not RCRA.)<br><br>Deletion of “in-water disposal” is also consistent with the State ARAR identified below for “Solid Waste: General Provisions,” which indicates applicability to upland facilities (not in-water facilities). |
| Magnuson-Stevens Fishery Conservation and Management Act | 50 CFR Part.600.920  | Evaluation of impacts to Essential Fish Habitat (EFH) is necessary for activities that may adversely affect EFH. | Location-specific. Potentially applicable if the removal action may adversely affect EFH.  | Does “removal” mean “remedial action” here?  |

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| River and Harbors Act        | 33 USC 401 et seq. 33 CFR parts 320 to 323 | Section 10 prohibits the unauthorized obstruction or alteration of any navigable water. Structures or work in, above, or under navigable waters are regulated under Section 10. | Action-specific. Applicable requirements for how remedial actions are taken or constructed in the navigation channel. | The Rivers and Harbors Act is not limited to the navigation channel. Application is broader in that it prohibits the creation of any obstruction that would impede navigation and commerce. Generally, the federal and state harbor line (or wharf line) is used to guide this determination, not the navigation channel.               |
| Toxic Substances Control Act | 15 USC §2601 et seq.                       |   | Chemical-specific. TSCA requirements are applicable to contaminated material or surface water with PCB contamination. | We understand this to relate to the handling of any “PCB remediation waste” as defined in 40 CFR 761.3 (and as cited by EPA’s Contaminated Sediment Guidance). Is this what EPA is referring to? (Generally would only apply if PCB concentrations in dredged material exceeded 50 ppm, which would seem to be more “action specific”). |

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| <b>State ARARs</b>                              |  |  |   |   |
| Oregon Environmental Cleanup Law<br>ORS 465.315 | Oregon Hazardous Substance Remedial Action Rules OAR 340-122-0040(2)(a) and (c), 0115(3),(32) and (51) | Sets standards for degree of cleanup required, including for oil and other petroleum products/wastes. Establishes acceptable risk levels for human health at $1 \times 10^{-6}$ for individual carcinogens, $1 \times 10^{-5}$ for multiple carcinogens, and Hazard Index of 1 for non- carcinogens; and protection of ecological receptors at the individual level for threatened or endangered species and the population level for all others. OAR 340-122-0040 and 0115(3) | Chemical-specific: a risk-based numerical value that, when applied to site-specific conditions, will establish concentrations of hazardous substances that may remain or be managed on-site in a manner avoiding unacceptable risk. | <p>We assume that this means that any particular criteria or requirement from the Oregon rules would be applied in the same manner it would be applied in the context of the Oregon Cleanup Law and implementing rules as a whole. It is unclear how compliance with Oregon laws will be determined given that the risk assessment has proceeded using assumptions and methodologies different than those applied under Oregon law.</p> <p>E.g.,</p> <ul style="list-style-type: none"> <li>-- Oregon law specifically allows for the use of probabilistic risk assessments-- Oregon "acceptable risk level for populations of ecological receptors" are defined differently</li> <li>-- the <math>10^{-6}</math> risk level under Oregon law applies only to individual carcinogens, in the case of PCBs meaning individual congeners</li> <li>-- human health exposure assumptions would differ under Oregon law as compared to those directed by EPA.</li> </ul> |

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|  | OAR 340-122-0040(4) and (b), 340-1220115(32)                    | <p>For hot spots of contamination in water, requires treatment, if feasible, when treatment would be reasonably likely to restore or protect beneficial uses within a reasonable time.</p> <p>For hot spots contamination of sediments, requires treatment or excavation and off-site disposal of hazardous substances if treatment is reasonably likely to restore or protect such beneficial uses within a reasonable time.</p> | Chemical-specific and action-specific: when contaminant concentrations fall within the definition of “hot spot” set forth in subpart 0115(32), treatment (including excavation and off-site disposal) of contaminated media to levels below such risk levels or beneficial-use impacts needs to be evaluated in the feasibility study. | As above, we assume this means that the Oregon “hot spot” rules would be applied in the same manner they would be applied in the context of the Oregon Cleanup Law and implementing rules as a whole. With respect to the “toxicity” component of the hot spot definition for “media other than groundwater or surface water,” the hot spots are based on a multiplier of the “acceptable risk level,” which requires a consideration of all the evaluation factors raised above. In addition, Oregon hot spots in sediment based on toxicity are defined only in relation to individual chemicals, not classes of compounds. OAR 340-122-0115(32). |
| Hazardous Waste and Hazardous Materials II | ORS 466.005(7) OAR 340-102-0011 - Hazardous Waste Determination | Defines "Hazardous Waste" and the rule contains the criteria by which anyone generating residue must determine if that residue is a hazardous waste.  | Chemical- and Action-specific: specifies substantive requirements if remedial action will involve on-site treatment, disposal, or storage of RCRA-listed or characteristic hazardous waste. (Note: off-site treatment, storage, or disposal subject to all administrative and substantive state requirements.)                         | The LWG ARARs Table was more specific by stating that this ARAR is not applicable to in-water disposal. EPA’s Table was silent on this issue. As explained above for RCRA – Solid Waste, sediments managed under the Clean Water Act are exempt from the definition of hazardous waste (40 CFR 261.4(g)).   |

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| ODFW Fish Management Plans for the Willamette River                               | OAR 635, div 500 | Provides basis for in-water work windows in the Willamette River.   | Action-specific. Potentially applicable to timing of implementation of the remedial action due to presence of protected species at the site. | We need clarification from EPA as to whether these plans contain substantive requirements, and further what those requirements are within these plans that EPA would consider to be applicable or relevant and appropriate to the Portland Harbor site.              |
| Guidance for Assessment Bioaccumulative Chemicals of Concern in Sediment DEQ 2007 |                  | Describes a process to evaluate chemicals found in sediment for their potential contribution to risk as a result of bioaccumulation. Provides alternative methods for developing sediment screening levels and bioaccumulation bioassay data. | To be Considered: in level of cleanup or standard of control that is protective.   | Need clarification as to what specifically EPA believes should be considered that has not already been considered.   |
| Other TBC   |                  |   |  | The LWG proposed ARARs table included the Oregon Plan and Wy-Kan-Ush-Mi Wa-Kish Wit as identified in Section 4.6.1 of the Statement of Work to the Administrative Settlement Agreement. We would like to confirm that EPA no longer wishes to include these as TBCs. |

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